

ATTORNEY DOCKET NO.  
04-005-US1 (IST 3420001)

PATENT APPLICATION  
SERIAL NO. 10/645,202

**AMENDMENTS TO THE DRAWINGS**

The attached sheets of drawings include changes to Figs. 1-11b.

Attachment: Replacement Sheets 1-11.

**REMARKS/ARGUMENTS**

**1.) Claim Amendments**

The Applicant has amended claims 1, 10 and 24 and has cancelled claim 18. Accordingly, claims 1-6, 9, 10, 12-17 and 19-24 are pending in the application. Favorable reconsideration of the application is respectfully requested in view of the foregoing amendments and the following remarks.

**2.) Examiner Objections - Drawings**

The drawings were objected to because they failed formal requirements. In response, the Applicant is submitting replacement sheets addressing the Examiner's suggestions. The Examiner's approval of these drawings is respectfully requested.

**3.) Examiner Objections - Specification**

The Examiner objected to the disclosure because of several informalities. The Applicant thanks the Examiner for his careful review of the specification. In response, the Applicant has modified the specification as suggested by the Examiner. The Examiner's consideration of the amendments to the Specification is respectfully requested.

**4.) Claim Rejections – 35 U.S.C. § 112**

The examiner rejected claims 10, 12, and 13 under 35 U.S.C. § 112, second paragraph as being indefinite for failing to particularly point out and distinctly claim the subject matter which the Applicant regards as the invention. The Examiner identified claim 10 as lacking sufficient antecedent basis. Claims 12 and 13 were rejected for being dependent upon an indefinite base claim. Claim 10 has been amended to remedy this rejection and claims 12 and 13 depend from amended claim 10. Therefore, it is believed that this rejection has been addressed. The allowance of claims 10, 12, and 13 is, therefore, respectfully requested.

### 5.) Claim Rejections – 35 U.S.C. § 102(b)

The Examiner rejected claims 1-3, 9-10, 12-14, 18-20, 22 and 24 under 35 U.S.C. § 102(b) as being anticipated by Baumgartner et al (EP 0 669 109 B1). The Applicant respectfully traverses this rejection. The Applicant has amended claims 1 and 24 and cancelled claim 18 to further clarify the scope of the invention and expedite allowance of the application.

It is respectfully submitted that the Baumgartner reference fails to disclose features of amended independent claims 1 and 24. For example, amended claims 1 and 24 require: "...at least one *substantially rigid longitudinal spinal rod*..." . (Emphasis added).

Claim 1 in Baumgartner states:

"a stabiliser for adjacent thoracic vertebrae comprising a **strap**,  
**which is made of elastic synthetic material** and has a round cross-section (11) which is resistant to shearing forces, and at least two pedicular screws (2, 3)..."

The device in Baumgartner does not have a longitudinal rod, but an "elastic" "strap". Webster's II New College Dictionary defines strap as "*1a. A long, narrow strip of pliant material, as leather.*" Webster's II New College Dictionary further defines elastic as: "*1. Returning or capable of returning to an initial state or form after deformation.*" Figs. 6 and 7 of Baumgartner reinforce these definitions of strap and elastic by showing strap 1 twisting and folding back on itself, which would be characteristic of a pliant or elastic material. A substantially rigid spinal rod is not elastic or pliant, but provides generally rigid stabilization. A spinal rod would not allow the folding and twisting shown in Figs. 6 and 7.

In view of the foregoing, it is apparent that the cited reference does not disclose, teach or suggest the unique combination now recited in amended Claims 1 and 24. Applicant therefore submits that amended Claims 1 and 24 are clearly and precisely distinguishable over the cited reference in a patentable sense, and are therefore allowable over this reference and the remaining references of record. Accordingly, Applicant respectfully requests that the rejection of amended Claims 1 and 24 under 35 U.S.C. § 102(b) over Baumgartner be withdrawn and that Claims 1 and 24 be allowed.

Claims 2-6, 9-10, 12-14, 18-20, 22 depend on and further limit Claim 1. Hence, for at least the aforementioned reasons, these Claims would be deemed to be in condition for allowance.

Applicant respectfully requests that the rejections of the dependent Claims 2-6, 9-10, 12-14, 18-20, 22 also be withdrawn.

**6.) Claim Rejections – 35 U.S.C. § 103 (a)**

Claims 4-6, 21 and 23 stand rejected under 35 U.S.C. §103(a) over Baumgartner (EP 0 669 109 B1). In light of the amendments submitted herewith, patentably distinguishing independent Claims 1 and 24 from the art of record, the Applicant respectfully submits that these rejections have also been overcome. Accordingly, the Applicant respectfully requests that the rejections be withdrawn.

The Examiner rejected claims 4-6, 21 and 23 under 35 U.S.C. § 103(a) as being unpatentable over Baumgartner (EP 0 669 109 B1). According to the Examiner: "It is well known in the art to use transverse rod connectors / cross-links to stabilize parallel rods in relationship to one another. One having ordinary skill in the art at the time the invention was made would have readily utilized a cross-link in the device of Baumgartner et al, especially in instances where Ole rods extended over a prolonged distance of the spine." The Applicant respectfully traverses this rejection.

To preserve the Applicant's right to traverse this assertion in later actions, the Applicant respectfully traverses the assertion that such limitations are obvious in light of what is "well known in the art" and, as permitted under MPEP § 2144.03, requests that the Examiner cite a reference in support of his position for each rejected claim.

Alternatively, if the Examiner is relying on personal knowledge as the basis for these assertions, the Applicant respectfully objects to the Examiner's use of official notice. Under MPEP § 2144.03, official notice may only be taken of "facts outside of the record which are capable of instant and unquestionable demonstration as being 'well-known' in the art." (Emphasis added). When a rejection is based on facts within the personal knowledge of the Examiner, the facts must be as specific as possible, and the reference must be supported, when called for by the Applicant, by an affidavit of the Examiner, which may be subject to explanation by the Applicant. 37 CFR 1.104(d)(2). Pursuant to 37 CFR 1.104(d)(2), the Applicant must respectfully request the Examiner provide such supporting facts and evidence in the form of an

affidavit, so that, if necessary, the Applicant may have a chance to explain the reference in later actions.

Applicant hereby requests an extension of time for making this reply and hereby authorizes the Commissioner to charge the amount of \$60.00 to Deposit Account No. 50-0605 of CARR LLP for the required fee. Applicant does not believe that any other fees are due; however, in the event that any fees are due, the Commissioner is hereby authorized to charge any required fees due (other than issue fees), and to credit any overpayment made, in connection with the filing of this paper to Deposit Account No. 50-0605 of CARR LLP.

Should the Examiner deem that any further amendment is desirable to place this Application in condition for allowance, the Examiner is invited to telephone the undersigned at the number listed below.

Respectfully submitted,

CARR LLP

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